STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 12, 2005
v	No. 251720 Macomb Circuit Court
JOEY DEAN JARVIS, Defendant-Appellant.	LC No. 03-000570-FH

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced him to 12 to 120 months in prison. We affirm.

Defendant first claims that the prosecutor committed misconduct in his closing argument when he stated, "Now the testimony on this case was fairly clear cut. I mean, you really only had one version of what happened and that was [from] the victim, Vickie Lewis." Defendant alleges that the prosecutor improperly commented on defendant's silence. We disagree.

Because defense counsel did not object to the prosecutor's alleged misconduct at trial, defendant has failed to preserve this issue. See *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). We review this unpreserved claim for plain error that affected defendant's substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Reversal is warranted only if a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 LEd2d 177 (2004). If a curative instruction could have alleviated any prejudicial effect, this Court will not find error requiring reversal. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001); *Schutte*, *supra*, p 721. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Contrary to defendant's argument, we hold that the prosecutor did not state or make any inference that defendant failed to testify and explain his version of events. When reviewing the prosecutor's comment in context, we find that the prosecutor was merely arguing that the

testimony of the victim, Vicky Lynn Lewis, was undisputed and uncontradicted by any other evidence. A prosecutor may argue that certain evidence is uncontradicted. *People v Callon,* 256 Mich App 312, 331; 662 NW2d 501 (2003); *People v Guenther,* 188 Mich App 174, 177; 469 NW2d 59 (1991). Accordingly, the prosecutor's comment did not constitute plain error; defendant is not entitled to relief with respect to this issue.

We also find to be without merit defendant's claim that the prosecutor's comment shifted the burden of proof to defendant. Without shifting the burden of proof, the prosecutor properly argued that the undisputed evidence established defendant's guilt beyond a reasonable doubt. *Id.*

Next, defendant alleges that the prosecutor's comments regarding the jury's "duty" constituted misconduct. We disagree. Again, we review this unpreserved claim for plain error that affected defendant's substantial rights. *Rodriguez, supra*, p 32.

During closing argument, the prosecutor stated:

> . . . I'll ask you just to do your duty as jurors . . . and that is to return a verdict of guilty against the defendant[.]
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> * * *
>
> Don't come back on a lesser offense. I don't think that's doing your duty as jurors, because I think that the evidence is certainly sufficient to find him guilty of the principal charge and I ask you to do your duty as jurors and return that verdict.

A prosecutor may not urge jurors to convict a defendant as part of their civic duty. *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Abraham,* 256 Mich App 265, 273; 662 NW2d 836 (2003). Such arguments are condemned because they inject issues into the trial that are broader than the defendant's guilt or innocence of the pertinent charges and because they encourage the jurors to suspend their own powers of judgment. *Abraham, supra,* p 273. However, allegations of prosecutorial misconduct must be examined and evaluated in context. *Thomas, supra,* p 454. "The propriety of a prosecutor's remarks depends on all the facts of the case." *Rodriguez, supra,* p 30. Furthermore, "[p]rosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Schutte, supra,* p 721.

When reviewing the prosecutor's comments in context, it is evident that the prosecutor was merely making a final argument that the evidence at trial supported that defendant was guilty of the original offense rather than the lesser-included offense of assault and battery. The prosecutor properly drew inferences from the evidence presented at trial. *Bahoda, supra,* p 282. During closing argument, the prosecutor referred to the photographs of Lewis and the testimony of Officer Ross Peppler establishing Lewis' severe injuries to her eyes, nose, teeth, and head, and he argued that the specific intent to do great bodily harm could be inferred from "how badly [defendant] pummeled her face, [and] her head." The prosecutor argued that the jurors "have a duty, an obligation to return a verdict that is consistent with the evidence" and that, due to the extent of Lewis's injuries, the jurors should return a guilty verdict with regard to the charge of assault with intent to do great bodily harm. We hold that the prosecutor's comments about the jurors' "duty" was not a call to convict defendant as part of their civic duty but rather was an

argument based on the evidence and reasonable inferences drawn from the evidence. *Ackerman, supra*, pp 453-454.[1]

Next, defendant argues that defense counsel rendered ineffective assistance by withdrawing his request for an instruction on the lesser offense of aggravated assault, MCL 750.81a. We disagree. Because defendant did not move for a new trial or an evidentiary hearing with respect to this issue, defendant has failed to preserve the issue for review, and our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). In reviewing a claim of ineffective assistance of counsel, a trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). A defendant must demonstrate that the resultant proceedings were fundamentally unfair or unreliable. *Id.* Effective assistance of counsel is presumed, and a defendant assumes a heavy burden of proving otherwise. *LeBlanc, supra*, p 578.

Aggravated assault is a cognate lesser offense of assault with intent to do great bodily harm less than murder.[2] An instruction on a lesser offense is appropriate only if it is a necessarily included lesser offense, not a cognate lesser offense. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). Therefore, we hold that defendant was not entitled to an instruction on aggravated assault, see *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002), and defense counsel was not required to advocate a meritless position. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

In addition, we hold that defendant failed to overcome a strong presumption that counsel's alleged error constituted sound trial strategy. *Riley, supra*, p 140. Indeed, the defense

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[1] We note that, while a prosecutor has a duty to see to it that a defendant receives a fair trial, he may use "hard language" when it is supported by the evidence. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). A prosecutor is not required to phrase his arguments in the blandest of terms. *Id.*

[2] A cognate offense is one that contains an element not found in the greater offense. *People v Cornell*, 466 Mich 335, 345; 646 NW2d 127 (2002). An element of aggravated assault is the infliction of a serious or aggravated injury. MCL 750.81a. Serious or aggravated injury for purposes of this statute includes injury that causes disfigurement. *People v Norris*, 236 Mich App 411, 415 n 3; 600 NW2d 658 (1999); *People v Brown*, 97 Mich App 606, 611; 296 NW2d 121 (1980). Assault with intent to do great bodily harm, MCL 750.84, requires no infliction of an actual injury, aggravated or otherwise. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Because aggravated assault contains an element not found in assault with intent to do great bodily harm, aggravated assault is a cognate lesser offense of assault with intent to do great bodily harm. *People v Mendoza*, 468 Mich 527, 532 n 4; 664 NW2d 685 (2003).

theory at trial was that defendant was not guilty because he acted in self-defense or that he, at most, committed an assault and battery because he was intoxicated. An aggravated assault instruction might have reduced the chance of an acquittal or an assault and battery conviction. See, generally, *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996). We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Also, that counsel's strategy did not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant additionally claims ineffective assistance of counsel based on the alleged prosecutorial misconduct discussed earlier in this opinion. However, as discussed earlier, the prosecutor's comments during his closing argument did not constitute misconduct, and defense counsel will not be deemed ineffective for failing to advocate a meritless position or failing to bring a fruitless motion. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000); *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Next, defendant claims that the trial court erred when it denied defendant's request for a jury instruction with regard to the issue of consent. We disagree. We review claims of instructional error de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002), remanded in part on other grounds 467 Mich 888 (2002). Jury instructions are reviewed for error in their entirety, must include all of the elements of the crime charged, and "must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "To give a particular instruction to a jury, it is necessary that there be evidence to support the giving of that instruction." *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988).

Under *People v Worrell*, 417 Mich 617, 622; 340 NW2d 612 (1983), consent is "a defense to every charge of assault." However, defendant was not entitled to an instruction on consent as a defense because there was no evidence to support it. *People v Stull*, 127 Mich App 14, 19; 338 NW2d 403 (1983). At trial, Lewis specifically denied that she was a willing participant. Lewis' testimony about her hitting defendant a couple of times shows, at most, her attempt to stop him from yelling and accusing her of being with another man. The trial court did not err in refusing to give the consent instruction.

Finally, defendant argues that the trial court erred in removing Juror 226 during the trial and denying defendant's motion for a new trial based on the removal. We disagree. We review a trial court's ruling on a motion for a new trial for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999); see also *People v Benny Johnson*, 245 Mich App 243, 250; 631 NW2d 1 (2001).

During voir dire, the jurors learned that defendant was charged with assault with intent to do great bodily harm less than murder in the context of domestic violence. The trial court then asked the jury, "Has anybody been a victim of a crime?" Juror 226 did not respond to the trial court's question. Later, the following colloquy with Juror 226 occurred:

The Court: You ever been a victim of a crime?

Juror No. 226: No.

The Court: You have any relatives in law enforcement?

Juror No. 226: No.

The Court: Do you have any interesting thoughts for us on intoxication?

Juror No. 226: No.

The Court: You listen to all the questions yesterday?

Juror No. 226: Yes, I did.

The Court: Anything jump out at you where we should know about something?

Juror No. 226: No.

The prosecutor and defense counsel had no questions for Juror 226. After jury instructions and the commencement of deliberations, the court indicated that there was a note from the foreperson; it read as follows: "Judge, during deliberations it's come to the jury's attention that a juror was the victim of a domestic violence, with no criminal charges filed. This was not declared during jury selection." Defense counsel requested that the court remove this juror. The court brought the foreperson, Juror 187, into the courtroom. The foreperson stated that Juror No. 226 was "stuck, stuck, stuck on the same identical item" and then "she just blurted it right out that, yes, well I've been involved in a domestic violence with [a] boyfriend . . . ." The foreperson reported that the rest of the jury asked why Juror 226 did not disclose this information during voir dire. The foreperson further indicated that the situation was causing the jury "a problem to be able to reach a verdict" and there were "some upset feelings with the existing 11 --" The court then brought Juror No. 226 into the courtroom and the following colloquy ensued:

The Court: . . . First of all, were you the victim of something like a domestic violence?

Juror No. 226: Yes.

The Court: Any charges filed?

Juror No. 226: No.

The Court: Did we ask that question?

Juror No. 226: You did not ask me that question.

The Court: Did I ask you if you've been the victim of a crime?

Juror No. 226: Yes.

The Court: Okay.

> Do you feel that having had that experience that it's any kind of a problem for you to judge this case fairly rather than say a drunk driving case or a property crime case?

Juror No. 226: No. Actually, I believe I can see both sides of the issue.

Defense counsel had no questions for Juror 226. The prosecutor asked why no charges were brought, and Juror 226 answered that "there were issues where it was two sided" and said that she was not severely injured. Defense counsel moved for a mistrial on the basis "that the jury has been poisoned and cannot be corrected[.]" The court denied defendant's motion for a mistrial. The prosecutor moved to have Juror 226 removed. The court removed Juror 226 from the jury over defendant's objection, concluding, in part:

> It's a fact that this is essentially a domestic violence case she did not – she did not answer the question accurately, if not truthfully. If she had answered the question there certainly would have been follow-up questions from myself or from counsel. It may be that it's a person the defendant would want on there. It may be it's a person the prosecutor would not want on there or vice versa. That was not able to be explored through the jury selection process. . . . They're given an oath to answer these questions truthfully and honestly. Without attributing any specific intent to her or defining what the normal meaning of intent is, she has not answered the question accurately and, therefore, did damage to the process. And I think we have no – not we, this court I think it's in the best interests of justice in this case that this jury to have her removed [sic] from the jury.

An alternate juror was then put on the jury, and the jury eventually rendered its verdict.[3]

Defendant filed the motion for a new trial and argued that defendant's right to a unanimous verdict was violated when the court removed a juror without a showing of actual bias. The court denied defendant's motion for a new trial because Juror 226 did not reveal that she was a victim of a crime. The trial court observed:

> Essentially the juror did not come clean in jury selection. Both the prosecution and the defense were entitled to know whether she felt she was a victim or not, if there had been some type of incident in her past. . . . It is for that reason that the juror was removed. . . . It is in hindsight that we assume how that juror was tilting. We didn't know that from anything on the record. We look at the way the

[3] As noted, defense counsel initially sought the removal of Juror No. 226 and a mistrial. The trial court denied the motion for a mistrial, and defense counsel then indicated that he had no objection to the juror's remaining on the panel. The trial court then excused the juror upon the prosecutor's motion. Despite the equivocation of defense counsel and his possible waiver of this issue, we have reviewed the issue on a plenary basis.

verdict eventually was and we make an assumption. We don't know how she would have ultimately ended up voting if she had stayed on.

MCR 2.611(A)(1)(b) provides, in pertinent part, that a "new trial may be granted . . . whenever . . . substantial rights are materially affected" because of "misconduct of the jury[.]" To be entitled to a new trial on the basis of juror misconduct, a defendant must "establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause." *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998); see also, generally, *People v DeHaven*, 321 Mich 327, 334; 32 NW2d 468 (1948) (new trial required because two jurors did not disclose when asked that each had a family member that had pleaded guilty to an offense similar to that at issue in the case).

We agree with the trial court's ruling that the juror was properly excusable for cause. *Daoust, supra*, p 9.[4] The record reflects that Juror 226, who denied during voir dire that she had been a victim of a crime, informed the jury during deliberations that she had in fact been the victim of domestic violence. She then admitted to the court that she had been the victim of domestic violence. This record was sufficient for the trial court to determine that Juror 226 did not disclose a fact that, if she revealed it, would have led defense counsel or the prosecutor to challenge her for cause. Also, had the court not excused the juror, defendant may have been entitled to a new trial. See, generally, *DeHaven, supra*, p 334. Accordingly, the trial court did not abuse its discretion in removing Juror 226 and denying defendant's motion for a new trial.

Moreover, contrary to defendant's argument, an additional showing of actual prejudice was not required to remove Juror 226 because she was excusable for cause. *Daoust, supra*, p 9. The trial court, which was in the best position to assess the credibility of Juror 226, did not accept her statement that she could "see both sides of the issue" and properly decided to disqualify Juror 226, concluding that her inaccurate answer damaged the jury selection process. Reviewing courts give great deference to the superior ability of the trial court in matters relating to credibility. See *Benny Johnson, supra*, p 257 n 5. Since there were two alternate jurors, the trial court properly decided that the safest route would be to dismiss Juror 226 and substitute an alternate juror.

Furthermore, we reject defendant's claim that his right to a unanimous verdict by the jury was violated. A criminal defendant has the right to a unanimous verdict by a jury. *People v*

[4] We note that in *Daoust, supra*, p 9 n 3, the Court stated that "our holding does not address situations in which it is discovered that one of the jurors has lied during voir dire." However, *Daoust* was addressing whether a defendant was entitled to a new trial because a questionable juror *remained on the jury*. Footnote 3 from *Daoust* therefore indicates that, if a juror lies during voir dire and remains on the jury, reversal might be warranted even if neither of the two enumerated conditions (actual prejudice or being excusable for cause) is present. Here, we face a situation in which the questionable juror was *removed* from the jury. Therefore, the two enumerated conditions from *Daoust* provide us guidance, despite the fact that the instant case involves a possible situation of juror dishonesty during voir dire. In other words, if a juror lies during voir dire and the trial court subsequently dismisses the juror, the dismissal will be deemed proper if the juror was properly excusable for cause.

Cooks, 446 Mich 503, 510-511; 521 NW2d 275 (1994). Here, there is no reliable record evidence to demonstrate that Juror 226 intended to vote in favor of defendant. Neither defense counsel nor the prosecutor made an inquiry of the jury regarding the status of their deliberations or their voting division. As the trial court indicated, defendant cannot "assume how that juror was tilting," or how she would have ultimately voted, without the benefit of hindsight. The trial court gave an instruction to the jury that a verdict must be unanimous. After the court properly replaced Juror 226 with an alternate juror, the jury returned a unanimous verdict, finding defendant guilty of assault with intent to do great bodily harm less than murder. As such, defendant's unanimous verdict claim is without merit. *People v Johnson*, 187 Mich App 621, 630; 468 NW2d 307 (1991).

Affirmed.

/s/ Patrick M. Meter
/s/ Richard A. Bandstra
/s/ Stephen L. Borrello